

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JESSE E. TORREZ)	
Claimant)	
)	
VS.)	
)	
GLEN HAMMONDS CONSTRUCTION)	
Respondent)	Docket No. 1,014,256
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 4, 2008 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on June 10, 2008.

APPEARANCES

Mark E. Kolich, of Lenexa, Kansas, appeared for the claimant. James M. McVay, of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument respondent conceded that if this claim is compensable, claimant is entitled to 2.57¹ weeks of temporary total disability (TTD) benefits as well as past and future medical benefits for his work-related injury. Moreover, respondent agrees that it is responsible for the court reporter fees in this matter.

ISSUES

The ALJ denied claimant's claim for compensation as he concluded it was "unsettled whether Mr. Torrez was working for respondent when he fell in the hole."²

¹ This is the period 5/29/03 to 6/15/03.

² ALJ Award (Mar. 4, 2008) at 5.

The claimant requested review of the Award asserting a variety of issues to be addressed. However, at oral argument, the parties agreed that in the event claimant's injury is found to have arisen out of and in the course of his employment with respondent, the remaining issues, except for the nature and extent of claimant's resulting impairment, would be voluntarily resolved.³

Claimant maintains that he was working for respondent at a construction site when he fell into a hole and suffered injury, sustaining a 10 percent permanent partial impairment⁴. Thus, claimant asks the Board to reverse the ALJ's finding as to the compensability of this claim and enter an Award in his favor.

Respondent urges the Board to affirm the ALJ's findings and conclusions. Respondent maintains claimant was at the work site but was working for another company at the time of his injury. In the same breath, respondent argues that claimant was at the construction site for the sole purpose of picking up his paycheck, an act that respondent contends is outside the scope and course of his employment. And even if the claim is found compensable, respondent believes Dr. Stuckmeyer's rating is not supported by the *Guides*⁵ and should be disregarded, with the Board making a finding that claimant has failed to meet his evidentiary burden with respect to his permanent disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a laborer by respondent, who was acting as a general contractor, building a residential dwelling in Spring Hill, Kansas. Respondent had contracted with another company, Crim Foundations, to pour the footings and vertical walls for the basement of the house while respondent's own employees, including claimant, were going to provide the labor necessary to create the flatwork on the house. On April 24, 2003, it was raining but work on the project continued as the footings could be poured and covered from the elements. These are essentially the only facts that both parties have agreed upon. Beyond this, most everything is in dispute.

³ As noted above, if compensable, respondent concedes it is responsible for the TTD benefits, and past and future medical expenses causally related to the accident in addition to any permanency awarded herein.

⁴ All ratings are to the body as a whole.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted. (*Guides*)

Claimant testified that he had been directed by respondent to work that day, helping out the workers pouring the footings. He denies that he was at the work site for any other reason but to work, helping out with the footings. Claimant also testified that Glen Hammonds, respondent's owner, was at the construction site that entire morning moving a piece of equipment so that the concrete truck could enter the site to pour for the foundation work. Another individual named "Bubba" was there as well. While claimant was waiting for Mr. Hammonds to drive a piece of equipment past an area, claimant stepped back and fell into a hole, injuring his back and leg. Bubba and his wife took claimant to a nearby fire station and an ambulance was called. Claimant was taken to the hospital and admitted, where he stayed for 3 days. After approximately 3 weeks, claimant returned to work for a short period of time, then moved on to another company.

Glen Hammonds was deposed two times during the pendency of this claim. At his first deposition, Mr. Hammonds denied being on the property at the time of claimant's injury. He maintains he was across town at another site. But he decided to go check on the crew he hired to provide the foundation and footings. Only upon arriving at the residential construction site did he learn that claimant had fallen. He denies that claimant was working that day. Rather, Mr. Hammonds testified that claimant was at the site with Bubba.

At his second deposition, Mr. Hammonds testified that on April 24, 2003, he called claimant on the phone about 6:00 a.m. and explained that the crew would not be working. According to Mr. Hammonds, claimant wanted his check. So Mr. Hammonds testified that he told claimant to meet him over at the residential construction site. According to Mr. Hammonds he saw claimant at 7:00 or 7:30 a.m. At some point he told claimant to come back later and retrieve his paycheck. Mr. Hammonds believes claimant was waiting at the site for him to return to deliver the paycheck when he was injured. He further testified that he believed that claimant and Bubba left the site at 7:00 or 7:30 a.m. to go drink and then returned to retrieve claimant's check. And that is when claimant fell.

Jeana Gunn, the subsequent owner of Crim Foundations, testified that she was the supervisor/foreman on the project where claimant was injured. She confirmed that respondent hired Crim Foundations to install the foundation and footings for the dwelling. She further testified that she could not recall if Glen Hammonds was on the site on April 24, 2003, or if there was any of Hammonds' equipment on the site. She further confirmed that claimant had never been hired to work for her father's company, at least based upon her review of the business records.

After his hospitalization, claimant received conservative treatment and has incurred a number of medical bills that to date, have not been paid. Only one physician has examined claimant and offered an opinion as to his diagnosis and ultimate impairment rating. Dr. James Stuckmeyer examined claimant first on August 28, 2003 and diagnosed left sided rib pain, scapulothoracic pain and intercostal pain. Following that examination he assigned a 10 percent permanent partial impairment and offered no work restrictions.

Thereafter, Dr. Stuckmeyer examined claimant again on October 9, 2007. At that point, his diagnosis and impairment opinion was the same. He testified that claimant's complaints of back pain and chest wall pain are consistent with one who would have had an incomplete, nondisplaced rib fracture. After some discussion it was clear that there was no definitive category within the *Guides* that provided a rating of 10 percent. Rather, Dr. Stuckmeyer used his experience and judgment to extrapolate a rating based on various sections of the *Guides* to address claimant's scapulothoracic dysfunction and the involvement of the thoracic spine and the pain in claimant's chest wall.

The threshold issue to decide is whether claimant has sustained his burden of establishing that he sustained an accident arising out of and in the course of his employment. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁸

Respondent maintains claimant's accident did not arise out of and in the course of claimant's employment. Glen Hammonds asserts that his employees were not on the site on this day as this was the day that the basement walls and footings were to be poured by respondent's subcontractor, Crim Foundations and because it was too rainy. At oral argument respondent's counsel was adamant that claimant's own testimony places him at the site as an employee of Crim Foundations.

⁶ K.S.A. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁸ *Id.*, 258 Kan. 272, 899 P.2d 1058 (1995)

While there are selected statements within claimant's testimony that might suggest that claimant was working for the subcontractor, the greater weight of the evidence is that he was working for respondent and that he had been directed to appear at the site and do just as he says - help lay the foundation and footings. Claimant continually testified that he was there, as respondent's employee, to help lay the foundation and footings. And Ms. Gunn had no records that would support respondent's contention that claimant was working for Crim Foundations. Rather, claimant was working as respondent's employee to further the respondent's entire construction process.

Respondent's arguments in this matter serve only to erode its credibility. The entirety of Mr. Hammonds first deposition was spent denying that claimant worked for respondent on April 24, 2003 at the construction site.⁹ Instead, he maintained claimant was working for Crim Foundations, a fact that is not borne out by the evidence. Some years later, in a second deposition, he testified that he denied that claimant was his employee on that date but explained that he had talked to claimant early that morning and explained that they were not going to be working that day. Then he further testified that if claimant wanted his check, he should come to the site to pick it up. And when claimant did, he fell into a hole sustaining injury.

Although the ALJ seemed to think it was "unsettled" as to claimant's reasons for being on the construction site at the time of the injury, the Board finds claimant's recitation of the events to be credible, particularly in light of Mr. Hammonds version(s) of the event. The Board finds that claimant sustained injury in an accident that arose out of and in the course of his employment with respondent. Thus, the Award is reversed on this issue.

Turning now to the nature and extent of claimant's impairment, there is a single impairment rating contained within the record. Dr. Stuckmeyer examined and rated claimant on two separate occasions. In both instances he assigned a 10 percent to the whole body. Respondent maintains that his rating is not consistent with the *Guides* as his "opinion is not found within the AMA Guides or within any of the objective treatment records." Essentially, what respondent seems to be arguing is that because there is no corresponding diagnosis within the *Guides*, Dr. Stuckmeyer's diagnosis, analysis and opinion should be disregarded.

Having reviewed Dr. Stuckmeyer's opinions, particularly in light of the fact that there is no other medical evidence upon which to compare, the Board finds Dr. Stuckmeyer's opinions to be reasonable and therefore, claimant is found to have sustained a 10 percent permanent partial impairment to the whole body. There is no testimony in the record that suggests that Dr. Stuckmeyer did not use the *Guides* correctly and the statute, K.S.A. 44-510e(a) allows the physician to go outside the *Guides* when the condition is not contained therein.

⁹ Hammonds Depo. (Nov. 1, 2004).

In light of the foregoing findings and the parties' stipulations, the remaining issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 4, 2008, is reversed and claimant is found to have sustained an accidental injury arising out of and in the course of his employment with respondent. He is hereby awarded a 10 percent permanent partial impairment to the body as a whole.

The claimant is entitled to 7.45 weeks of temporary total disability compensation at the rate of \$432.00 per week or \$3,218.40 followed by 41.50 weeks of permanent partial disability compensation at the rate of \$432.00 per week or \$17,928.00 for a 10% work disability, making a total award of \$21,146.40.

As of June 30, 2008 there would be due and owing to the claimant 7.45 weeks of temporary total disability compensation at the rate of \$432.00 per week in the sum of \$3,218.40 plus 41.50 weeks of permanent partial disability compensation at the rate of \$432.00 per week in the sum of \$17,928.00 for a total due and owing of \$21,146.40, which is ordered paid in one lump sum less amounts previously paid.

Respondent is also ordered to pay claimant's past medical bills as itemized in the regular hearing and any future medical expenses as well as the court reporter costs.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge